MOTION FILED
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No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

v.

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

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July 14, 1988

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Texaco Wholesalers hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the National Association of Texaco Wholesalers arises because its members will be directly and negatively affected should the ruling of the Court of Appeals for the Ninth Circuit stand. The Association is

better able to argue the effect of this case on its members than either of the parties would be.

Respectfully submitted,

S/

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

INTEREST OF THE NATIONAL ASSOCIATION OF TEXACO WHOLESALERS

The National Association of Texaco Wholesalers is an independent trade association composed of 1,300 wholesalers of "TEXACO" petroleum products. These wholesalers supply approximately 15,000 retail outlets, and collectively sell over half the gasoline and over 70 percent of the "middle distillates" refined by Texaco and sold in the United States.

As detailed below, the Ninth Circuit's decision in this case threatens to destroy the entire wholesale sector of petroleum marketing, including the businesses of every member of the Association. Accord-

ingly, the members have a vital interest in the outcome of the action.

REASONS FOR GRANTING THE WRIT

The National Association of Texaco Wholesalers will absorb the first impact of the Ninth Circuit's ruling if it is not reversed, but that blow will be followed by widespread disruption of wholesaling in every industry in the United States. The fate facing the Texaco wholesalers if this ruling is allowed to stand is, by itself, a compelling ground for granting the writ; but is only illustrative of the impending restructuring of distribution throughout the economy.

Specifically, if Texaco is forced to apply the Ninth Circuit's rule, it will have to either eliminate sales to retailers or eliminate discounts to wholesalers. "Cost justification" of discounts to each wholesaler is a notion that has meaning only to theorists—the reality is that Texaco will not assume either the risk or the enormous burden of estimating each wholesaler's costs and providing a commensurate wholesale discount.[1] Instead, it will sell to wholesalers at the same price it charges to retailers, effectively putting the wholesalers out of the wholesaling business. The only alternative would be for Texaco to halt direct sales to retailers entirely, which is plainly not the result that Hasbrouck desired or that Texaco is likely to choose.

If the Texaco wholesalers are faced with the prospect of paying the same prices as retailers they will

[1] The Ninth Circuit's ruling would force suppliers to sell to different wholesalers at different prices, a result which on its face conflicts with the rule against discrimination among competing distributors.

have two choices: Go out of business or expand into retailing. Of those who survive, many will decide to become chain retailer accounts instead of functioning as wholesalers. They will integrate vertically by acquiring retailers in their area, including many of the very retailers they are now selling to at wholesale. The economics of the situation will compel them to acquire as large a number of outlets as they can handle, so that their existing storage and distribution facilities (now used for wholesaling) will be fully utilized.

Ultimately, instead of having several wholesalers and Texaco itself all selling to retailers in the same market, as was the case in Spokane, there will be only Texaco, selling to chains of vertically integrated retailers, each of which will own the distribution and storage facilities they formerly ran as independent wholesalers. An entire level of competition will disappear. Worse yet, this scenario will be repeated in industry after industry throughout the nation.

This would be an economically disastrous result. Indeed, this Court on more than one occasion has voiced concern over excessive vertical integration in the chain of distribution. Only this year, in *Business Electronics Corp.* v. *Sharp Electronics Corp.* 108 S.Ct. 1515, 1520 (1988), the Court warned against an antitrust standard that "would create a perverse incentive . . . to integrate vertically into distribution, an outcome hardly conducive to fostering the creation and maintenance of small businesses." Similarly, in the pivotal case of *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 57 n.26 (1977), the Court observed that to the extent an antitrust rule prevents a firm from using a distribution system "to achieve

efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration . . . , thereby eliminating to that extent the role of independent businessmen."

Even in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967), which *Sylvania* overruled, the Court cautioned against adoption of a rule of antitrust law that "might sharply accelerate the trend towards vertical integration of the distribution process."

This caution is particularly applicable with regard to the Robinson-Patman Act, which is recognized to have real potential for anticompetitive effects and inefficient results and has therefore been approached with reservations. *See e.g., Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69,80 (1979), where the Court warned that the Robinson-Patman Act can be "in open conflict with the purposes of other antitrust legislation" if extended too far, and stated that the Act "should be construed consistently with broader policies of the antitrust laws".

CONCLUSION

Once the process the Ninth Circuit has set in motion is completed, everyone will pay higher prices—unless this Court seizes the opportunity to review this new "cost justification" standard. Ultimately, the consumer will pay more, not only for gasoline, but for every product now distributed through wholesalers. For all of these reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: July 14, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregg R. Potvin, a member of the Bar of this Court, hereby certify that on this 14th day of July, 1988, three copies of the Motion for Leave to File a Brief Amicus Curiae in the above titled case were mailed, first class postage prepaid, to counsel for petitioners, and to counsel for respondents, as listed below. I further certify that all parties required to be served have been served.

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